88-1873

Supreme Court, U.S.
FILED
MAY 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1988

BOROUGH OF EAST CONEMAUGH, FRANCIS FEIST, LARRY GOSSARD, ROBERT FISHER, JR., JOSEPH RISHELL, JOHN ZALUSKI, JOHN STECIK and MICHAEL VARGO, individual council members or their elected replacements,

Petitioners

vs.

EASTERN TELECOM CORPORATION

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITION FOR CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable William H. Rehnquist, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

East Conemaugh Borough and individual council members or their replacements, Petitioners herein, pray that a Writ of Certiorari issue to review the Judgment of the Circuit Court of Appeals for the Third Circuit entered in the above case on March 30, 1989.

STATEMENT OF QUESTIONS PRESENTED

I.

At a public meeting held by East Conemaugh Borough Council, pursuant to the Cable Communication Policy Act of 1984, as amended, 47 U.S.C. §521, et seq., (hereinafter the "Act"), the Borough Solicitor, in the presence of all council members, told representatives of a cable television system ("Eastern") to submit a cable system franchise renewal proposal by April 30, 1986. Did the Circuit Court erroneously construe the Act to require that such deadline be established by a formal borough resolution thus invalidating the deadline set by the Solicitor and creating a conflict between the Act and a Pennsylvania Statute which bestows upon the Borough Solicitor control of legal matters of the Borough (53 P.S. 46116).

II.

Did the Circuit Court err in construing the overall purpose of the Act to be the assurance of a high degree of protection to cable operators in conflict with the holding of the 4th Circuit Court of Appeals in the case of Tribune-United Cable of Montgomery County v. Montgomery County, Maryland, 784 F.2d 1227 (1986), which states that the primary purpose of the Act is to serve the needs and interests of local communities.

III.

Did the Circuit Court misconstrue the Act in applying deadline provisions strictly against the community and liberally in favor of the cable operator by holding that while the borough is strictly held to act on a franchise renewal proposal within four months after the required section 626(a) public meeting (47 U.S.C. §546(a)), the cable operator need not submit a proposal within said four months and, in fact, is not required to submit a proposal at all unless directed to do so by borough resolution.

IV.

The Act contains a general provision (§626(h), 47 U.S.C. 546(h)) allowing cable television franchise renewal proposals to be submitted and acted upon notwithstanding procedures being simultaneously pursued under other sections of the Act. Did the Circuit Court err by interpreting section 626(h) to allow cable operators to submit cable proposals at any time under any section of the Act, thus nullifying a preceding section of the Act (626(c)(1)) which necessarily mandates a four month deadline for submission of a renewal proposal after a 626(a) public meeting.

V.

Did the Circuit Court depart from the accepted course of judicial proceedings when it set aside the District Court's finding of fact that the borough had established a deadline by which a franchise renewal proposal was to be submitted.

VI.

Where the borough advised the cable operator by letter on June 30, 1986 that the franchise renewal proposal was untimely and therefore denied, and the cable operator failed to appeal that decision until March 12, 1987, did the Circuit Court err in misconstruing the 120-day appeal period of the Act and erroneously reverse the District Court's finding that the cable operator was time barred in bringing the appeal.

Note: The names of all parties are contained in the caption of the case.

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OPINIONS BELOW

The Opinion of the Circuit Court of Appeals for the Third Circuit is unreported and is set forth in the Appendix, Page A1. The Judgment of the Circuit Court of Appeals is set forth in the Appendix, Page A52. The Opinion of the District Court is unreported and is set forth in the Appendix, Page A14. The Order of the District Court is set forth in the Appendix, Page A40.

STATEMENT OF JURISDICTION

The Petitioners seek review of the Judgment of the United States Court of Appeals for the Third Circuit dated March 30, 1989 and entered March 30, 1989. (Appendix, Page A1)

The Supreme Court of the United States has jurisdiction to review the final order of the United States Court of Appeals pursuant to 28 USC §1254(1).

STATUTES INVOLVED

This case involves the following statutes:

1. The Cable Communications Policy Act of 1984, Pub. L. 98-549, 98 Stat. 2780, 47 U.S.C. §521 et seq.;

47 U.S.C. §626 is set forth in Appendix, Page A55,

47 U.S.C. §635 is set forth in Appendix, Page A64.

2. 53 Purdons Statutes §46006(3) is set forth in Appendix, Page A65.

3. 53 Purdons Statutes §46116 is set forth in Appendix, Page A67.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the United States District Court for the Western District of Pennsylvania, the Court of first instance, is section 626(e)(1) of the Cable Communications Policy Act of 1984, 47 U.S.C. §546(c) hereinafter the "Act"), which Act provides a national policy concerning cable communications, and §635(a)(1), 47 U.S.C.§555(a)(1) of said Act.

Petitioner, East Conemaugh Borough (hereinafter "Borough"), is a Pennsylvania borough incorporated pursuant to 53 Pa. C.S. §45201. Respondent, Eastern Telecom Corporation (hereinafter "Eastern"), is a Pennsylvania business corporation. Since 1951, Eastern or its predecessors, has maintained a cable television system in the Borough pursuant to a

borough franchise which expired on July 1, 1988.

Acting in accordance with section 626(a) of the Act, 47 U.S.C. §546(a), the Borough Solicitor and Borough Council conducted a public hearing on December 10, 1985 for the purpose of receiving statements from borough residents concerning Eastern's performance and to identify future cable-related community needs and interests. (Joint Stipulation of Facts, No. 6)

Representatives of Eastern, all members of the Borough Council and citizens from the community were present at this hearing. Although Eastern was asked whether it was prepared to submit a proposal for renewal of its cable

television franchise at this hearing, it did not submit such proposal.

The District Court found that Solicitor, following the public meeting of December 10, 1985, gave oral notice to Eastern representatives that a proposal for renewal of its franchise agreement was required to be submitted to the Borough by April 30, 1986. Eastern has denied that such notice was given. However, a transcript of the meeting which was received by Eastern in the end of March, 1986, indicates therein that the Solicitor requested a proposal be submitted within four months.(Plaintiff's Exhibit 2)

No such proposal was submitted by Eastern by May 13, 1986, on which date a Borough Council meeting was held and

the Council voted not to renew Eastern's franchise.

Thereafter, on June 14, 1986, Eastern submitted a proposed franchise agreement to the Borough. On June 30, 1986, the Borough Solicitor forwarded to Eastern a copy of the Findings of Fact, Conclusion and Decision adopted by the Borough at its May 13, 1986 meeting and thus informed Eastern that the franchise would not be renewed. (Joint Stipulation of Facts, No. 9)

Eastern, by letter dated November 3, 1986, requested the Borough to schedule an administrative hearing in accordance with section 626(c) of the Act 47 U.S.C. §546(c). The Borough, by letter dated November 19, 1986, denied Eastern's

request for an administrative hearing and on March 12, 1987, Eastern filed the within action seeking an order under 47 U.S.C. §546(e)(1) and §555 requiring the Borough to conduct an administrative proceeding under section 626(c) of the Cable Act or, in the alternative, to grant Eastern leave to appeal the Borough's decision not to renew the cable television franchise.

After a non-jury trial, the trial judge denied Eastern's motion seeking an order directing the Borough to conduct an administrative proceeding under the Act and further, concluded that said Court lacked jurisdiction to review the final determination of the Borough denying Eastern's renewal of its cable franchise. Thus, Eastern's motion seeking leave to

appeal the Borough's decision denying renewal of Plaintiff's cable television franchise under section 626 of the Act was also denied.

Upon appeal to the United States Court of Appeals for the Third Circuit, the trial judge's opinion was reversed. The Third Circuit held that it was irrelevant whether or not the Borough advised Eastern of the deadline for submitting a renewal proposal. The Third Circuit held that a direction by the Borough Solicitor in the presence of all members of Council instructing Eastern's representatives of the deadline for submitting the renewal proposal was insufficient because such a deadline must be established by a resolution and a majority vote of the Council. The Third Circuit in addition held that

such a deadline must be communicated to the franchise holder in writing.

The Third Circuit also reversed the trial court's decision that Eastern's suit was time barred by 47 U.S.C. §555 which provides that cable operators adversely affected by final determinations of a franchising authority must commence an action within 120 days after receiving notice of such determination. Whereas the trial court held that the final determination not to renew occurred on June 30, 1986, the date the Borough rejected Eastern's renewal application, the Third Circuit held that the 120-day appeal period ran not from June 30, 1986 but from November 13, 1986 which was the date the Borough responded to Eastern's request for a section 546(b) administrative hearing.

ARGUMENT

I.

This case is about the construction and application of provisions of the Cable Communications Policy Act of 1984, 47 USC §521 et seq., governing cable television franchise renewals and appeals and decisions of franchising authorities. The issues involve the way in which a municipality, faced with an expiring cable franchise, is to implement the Act and necessarily addresses the interaction of the Act and state laws governing municipal procedure.

The Circuit Court construed the Act to require that certain functions, properly within the province of the borourgh solicitor, be made by borough resolution and thus infringed upon Pennsylvania statutory law by inhibiting

powers of solicitors granted thereby.

The Petitioner Borough is organized under the laws of the Commonwealth of Pennsylvania and thus is subject to the provisions of the Pennsylvania Borough Code. Circuit Court cited 53 P.S. §46006 which deals with the powers to be exercised by the Borough council and concluded that council could only act by resolution to set a deadline for a cable television franchise renewal proposal. The Circuit Court ignored that section of the Borough code which empowered the Borough Solicitor to conduct all legal matters. 53 P.S. §46116 provides in part, "The legal matters of the Borough shall be within the control of the Borough Solicitor . . ."

In addition, 53 P.S. §46006 allows routine, ministerial and administrative duties to be made and exercised by officers of the borough.

Clearly, the deadline stated by the Borough in the presence of all council members and representatives of Eastern, and later ratified by decision of the council at their May 13, 1986 meeting, is a part of the Solicitor's duty to control legal matters. Setting a deadline is a ministerial and administrative function. To hold otherwise would place an unreasonable burden upon the functioning of municipal authorities in general and specifically in their implementation of the Federal Act. The Act gives the Borough the perogative to set a deadline for a proposal to be submitted

(47 U.S.C. §546(b)(3)).

The Circuit Court improperly placed restrictions on the manner in which a municipality can exercise its legal functions and, in this instance, its legal perogative.

Because the Act affects almost every cable television system in the United States, the Circuit Court's decision has a broad impact upon a multitude of franchising authorities, consumers and cable operators alike.

II.

One of the few opinions to be written concerning the Cable Act is Tribune-United Cable of Montgomery County vs. Montgomery County, Maryland, 784 F.2d 1227 (4th Cir. 1986) in which the Court was asked to act upon a stay of penalty provision of a franchise agreement until a decision under the Act had been finalized. In that case the Court states:

> "The purposes and thrust of the Act, however, evince a congressional desire that franchise agreement be applied and modified so as to obtain realistic and flexible regulatory framework recognizing the needs of both local governments and cable operators but primarily concerned with providing viable cable systems responsible to the needs and interests to the local communities they serve."

Despite this language, the Circuit

Court in the prsent case held that its opinion was ". . . consistent with the overall purpose of Congress, amply reflected in its legislative history, of assuring a high degree of protection to cable operators".

It should be noted that the District Court in the present case examined the legislative history of the Act and cited Tribune-United (supra) in holding that the primary concerns of the Act was to make the local franchising process the primary means of cable television regulation and to insure that the cable systems provided were responsive to the needs and interests of the local communities.

Thus, the Supreme Court is asked to

resolve the conflict which has arisen in these two Circuit Courts in delineating the purpose of the Act.

III.

The Act provides a framework for an orderly procedure to renew and review existing cable television franchises. The Act provides under section 626(a) (47 U.S.C. 546)(a)) that the Borough, during the six month period which begins with the 36th month before the franchise expiration,hold a public meeting to afford the public an opportunity to participate and to identify future cable related needs and review past performance of the cable operator.

The Act then gave the Borough the right to establish a date by which a franchise renewal proposal shall be submitted (47 U.S.C. 546(b)(3)).

The Act then required the Borough to act within four months after the conclusion of the section 626(a) hearing to either renew the franchise or determine that the franchise should not be renewed. Clearly the intent of the Act is to give the cable operator and the Borough 36 months to conclude all legal proceedings to determine the renewal of the franchise, including the 120 day appeal period. To do this, both the cable operator and the Borough should be required to take certain steps. The Circuit Court defeated this orderly process by requiring the Borough to act strictly in meeting the requirements of the Act in holding the public meeting, setting the deadline by a formal Borough resolution and then making its decision on the proposal within four months after the aforesaid

meeting. This obviously implies that the cable operator must submit a proposal within sufficient time for the Borough to act within the required four month period. By liberally construing the Act to permit the cable operator to submit a proposal at any time and to force the Borough to consider franchise renewal proposals after the Borough's deadline completely destroys the orderly procedure outlined in the Act. Although it is admitted that the four month period set forth in 47 U.S.C. 546(c)(1) is vague as applied to the cable operator, the law implies that a franchise must be submitted in order for the Borough to be able to act within four months.

By ignoring this necessary implication and allowing the cable operator to

submit a franchise at any time, the Act is rendered, in part, ineffective.

IV.

The Circuit Court incorrectly interpreted section 626(h), 47 U.S.C. 546(h) of the Act. That section is a general provision allowing cable franchise renewal proposals to be submitted and acted on at the discretion of the Borough at any time regardless of proceedings being undertaken pursuant to other sections of the Act. This is clear in the language of section 626(h) which states,

> "The provisions of subsections (a) through (g) of this section shall not apply to a decision to grant or deny a proposal under this subsection. The denial of a renewal pursuant to this subsection shall not affect action on a renewal proposal that is submitted in accordance with subsections (a) through (g)".

The Circuit Court seemingly misunderstood the function of this provision

when it cited this section to counter the Borough's argument that section 626(c)(1) necessarily implies that a franchise renewal proposal must be submitted within four months of the conclusion of the public meeting under section 626(a).

Section 626(h) is explicitly mutually exclusive of the other sections of section 626. To hold that section 626(h) allows an operator to act at any time under any section of the Act totally vitiates any attempts at structuring an orderly framework of procedure. This is especially true because the effect of the Circuit Court's decision is to require the Borough to hold an administrative proceedings at any time a franchise renewal proposal is submitted whether under section 626(a) through (g) or under

section 626(h). This is totally contrary to the language of the Act. This case should be reviewed to clarify the construction of the above provisions.

V.

The trial court made a finding of fact that the Borough established a deadline of April 30, 1986, by which Eastern was to submit a franchise renewal proposal. Both parties offered testimony specifically on this issue and the finding of the deadline was essential to the decision of the trial court.

Rule 52 of the Federal Rules of Civil Procedure sets forth the scope of review of findings of fact as follows:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

The Circuit Court circumvented this

Rule by raising, on its own, the issue of whether or not the internal decision making process of the Borough was sufficient in setting the deadline. By doing this, the Circuit Court indirectly defeated the findings of fact made by the trial court that a deadline had indeed been set and communicated to Eastern.

Neither party raised or argued the issue of what steps were, or should have been, taken to establish a deadline and no testimony was taken on this issue.

The Circuit Court in raising this issue and making a decision thereon based upon an insufficient record departed from the accepted course of judicial proceedings and circumvented the finding of fact of the trial court.

VI.

Under the Cable Act, section 635, 47 U.S.C. §555, "(a)ny cable operator adversely affected by any final determination made by a franchising authority under section 545 or 546 of this title may commence an action within 120 days after receiving notice of such determination, which may be brought in the district court of the United States for any judicial district for which the cable system is located . . ." The district court found that the final determination of the Borough occurred on June 30, 1986, the day on which Eastern received notice of Borough's decision denying the renewal of its franchise. The within action was not filed until March 12, 1987, more than 120 days after Eastern received notice of

the Borough's decision denying renewal of the cable franchise. Thus, the District Court held that the present action was not timely under section 635, 47 U.S.C. §555. The Circuit Court reversed by holding that the appeal period began to run on November 13, 1986, when Borough denied a request for an administrative hearing made by Eastern on November 3, 1986.

This finding by the Circuit Court is an incorrect interpretation of the Act and inconsistent with the Circuit Court's interpretation of other provisions of the Act. The Circuit Court held in this case that the limit on the time within which the Borough must complete an administrative proceeding on a duly submitted renewal proposal is four months under section 626(c) under the Act. The

District Court found that the operator submitted a renewal proposal to the Borough on June 14, 1986, a fact stipulated to by the parties prior to trial. (The Circuit Court misstated this date as July 14, 1986.) Eastern was notified of the rejection of this proposal on June 30, 1986.

There was never an administrative hearing conducted by the Borough within the four month time period established by the Circuit Court. If we are to follow the Circuit Court's interpretation, the 120-day appeal period would begin to run when the Borough failed to conduct a hearing within four months of June 16, 1986, the date Eastern submitted its renewal proposal. If we use this interpretation, Eastern failed to file an appeal

within 120 days of the termination of the four month period of section 626(c).

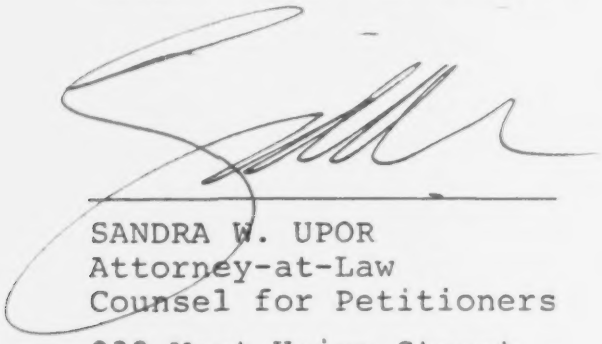
The finding of the Circuit Court that Eastern was not adversely affected until November 13, 1986, the date the operator requested an administrative hearing, is inconsistent with the Circuit Court's own finding that Eastern was adversely affected by the Borough's failure to conduct the administrative hearing within four months of June 16, 1986.

The proper interpretation of the Act was that of the District Court which found that Eastern was adversely affected by the letter and decision of the Borough received by Eastern on June 30, 1986 and Eastern should have appealed within 120 days thereof.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted:



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DATED: May 18th, 1989.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3516

EASTERN TELECOM CORPORATION,

Appellant

v.

BOROUGH OF EAST CONEMAUGH
FRANCIS FEIST, LARRY GOSSARD,
ROBERT FISHER, JR., JOSEPH RISHELL,
JOHN ZALUSKI, JOHN STECIK and
MICHAEL VARGO, individual council
members or their elected replacements,

Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA
D.C. Civil No. 87-557

Argued: January 24, 1989

Before: GIBBONS, *Chief Judge*,
SEITZ and GREENBERG,
Circuit Judges

(Opinion Filed: March 30, 1989)

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OPINION OF THE COURT

GIBBONS, *Chief Judge*:

Eastern Telecom Corporation, an operator of cable television systems, including the system serving the Borough of East Conemaugh, Pennsylvania, appeals from a judgment in favor of that Borough in Eastern's suit seeking to compel the Borough to comply with the franchise renewal procedures in the Cable Communications Policy Act of 1984, Pub. L. 98-549, 98 Stat. 2780, 47 U.S.C. § 521 *et seq*. The suit was tried non-jury, and the district court made findings of fact and conclusions of law. The court found that the Borough had in compliance with the Cable Act fixed a date for the submission of a renewal proposal, that Eastern missed this deadline, and that Eastern had no right to any further consideration of its proposal. There is no finding, and so far as we can determine, no evidence that a time limit for submission of proposals was fixed in the manner required by the Cable Act. We will therefore reverse and remand for further proceedings.

I.

In the 1984 Cable Act Congress amended the Communications Act of 1934 to provide a national policy concerning cable communications. Prior to the passage of the Cable Act there was no national policy on the development of cable television. The cable industry was regulated entirely at the local level through municipal franchise processes which defined the level of service, fixed rates, and in some instances fixed terms of franchises. Among the purposes of the Cable Act was the establishment of "an orderly process for franchise renewal which protects operators against unfair denials of renewal . . ." 47 U.S.C. § 521(5). The Cable Act defines "franchise" as "an initial authorization, or renewal thereof (including a renewal of an authorization which has been granted subject to section 526 of this title), issued by a franchising authority . . . which authorizes construction or operation of a cable system." 47 U.S.C. § 530(8). A "franchising authority" is "any governmental authority authorized by Federal, State or local law to grant a franchise." 47 U.S.C. § 530(9).

It is common ground that the Borough is a franchising authority authorized by Pennsylvania law to grant franchises, and that Eastern held a franchise which commenced on July 1, 1968, and continued until an expiration date of July 1, 1988. The Cable Act governs renewals of franchises which were in effect on October 30, 1984 and expire thereafter. 47 U.S.C. § 546(g). Thus renewal of Eastern's franchise is governed by the Cable Act, which provides for a two stage renewal process. 47 U.S.C. § 546(a)-(f).

In the first stage, the franchising authority may on its own initiative, or must if the cable operator requests, convene proceedings which afford the public in the franchise area an opportunity to participate in

"(1) identifying the future cable-related community needs and interests, and (2) reviewing the performance of the cable operator under the franchise during the current franchise term." 47 U.S.C. § 547(a). Such a proceeding must take place "[d]uring the six-month period that begins with the 36th month before the franchise expiration." *Id.* It is common ground that on December 10, 1985 the Borough convened a section 546(a) proceeding for the receipt of public comment.[1]

Once a section 546(a) public comment proceeding has occurred, a second stage of the renewal process is specified:

> (b) Submission of renewal proposals; contents; time
>
> (1) Upon completion of a proceeding under subsection (a) of this section, a cable operator seeking renewal of a franchise may, on its own initiative or at the request of a franchising authority, submit a proposal for renewal.
>
> (2) Subject to section 544 of this title, any such proposal shall contain such material as the

1. Another subsection provides:

> Notwithstanding the provisions of subsections (a) through (g) of this section, a cable operator may submit a proposal for the renewal of a franchise pursuant to this subsection at any time, and a franchising authority may, after affording the public adequate notice and opportunity for comment, grant or deny such proposal at any time (including after proceedings pursuant to this section have commenced). The provisions of subsection (a) through (g) of this section shall not apply to a decision to grant or deny a proposal under this subsection. The denial of a renewal pursuant to this subsection shall not affect action on a renewal proposal that is submitted in accordance with subsections (a) through (g) of this section.

47 U.S.C. § 546(h). See section IV of this opinion *infra*.

franchising authority may require, including proposals for an upgrade of the cable system.

(3) The franchising authority may establish a date by which such proposal shall be submitted.

(c) Notice of proposal; renewal; preliminary assessment of nonrenewal; administrative review; issues; notice and opportunity for hearing; transcript; written decision

(1) Upon submittal by a cable operator of a proposal to the franchising authority for the renewal of a franchise, the franchising authority shall provide prompt public notice of such proposal and, during the 4-month period which begins on the completion of any proceedings under subsection (a) of this section, renew the franchise or, issue a preliminary assessment that the franchise should not be renewed and, at the request of the operator or on its own initiative, commence an administrative proceeding, after providing prompt public notice of such proceeding, in accordance with paragraph (2) to consider whether--

(A) the cable operator has substantially complied with the material terms of the existing franchise and with applicable law;

(B) the quality of the operator's service, including signal quality, response to consumer complaints, and billing practices, but without regard to the mix, quality, or level of cable services or other services provided over the system, has been reasonable in light of community needs;

(C) the operator has the financial, legal, and technical ability to provide the services,

facilities, and equipment as set forth in the operator's proposal; and

(D) the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests.

(2) In any proceeding under paragraph (1), the cable operator shall be afforded adequate notice and the cable operator and the franchise authority, or its designee, shall be afforded fair opportunity for full participation, including the right to introduce evidence (including evidence related to issues raised in the proceeding under subsection (a) of this section), to require the production of evidence, and to question witnesses. A transcript shall be made of any such proceeding.

(3) At the completion of a proceeding under this subsection, the franchising authority shall issue a written decision granting or denying the proposal for renewal based upon the record of such proceeding, and transmit a copy of such decision to the cable operator. Such decision shall state the reasons therefor.

47 U.S.C. § 546(b)(c). These opaque provisions are at the heart of the dispute between the parties. The immediately following subsection narrowly circumscribes the permissible grounds for nonrenewal, and the next thereafter provides for judicial review of final nonrenewal decisions. 47 U.S.C. § 546(d)(e). The Borough's position is that acting pursuant to section 546(b)(3) it fixed a deadline for the submission by Eastern of a renewal proposal, and that Eastern, aware of that deadline failed to meet it. Thus, the Borough argues, none of the administrative or judicial review proceeding specified in section 546 are

required. Eastern, on the other hand, contends that no deadline was established and no deadline was communicated to it.

II.

More than 36 months before the expiration of its franchise, Eastern, attempting to negotiate a renewal of its franchise, submitted several proposals for renewal to the Borough. See 47 U.S.C. § 546(h). These proposals were rejected. On July 10, 1985, within 36 months of the July 1, 1988 expiration date, Borough Solicitor James R. Di Francesco sent a letter to Eastern advising that the Borough intended to construct its own cable television system. Di Francesco apparently was unaware of the provisions of the Cable Act protecting cable franchisees. When he was appraised of the law Di Francesco, by letter dated November 12, 1985, informed Eastern that it had scheduled a section 546(a) public hearing on December 10, 1985.

Such a hearing occurred, attended by members of the Borough Council, Borough Solicitor Di Francesco, and several representatives of Eastern. Eleven residents were questioned by the Borough Solicitor. The hearing lasted about one hour and twenty minutes. Near the end of the hearing Di Francesco commented:

> I have one more comment. I would like to direct this to Eastern Telecom. We still do not get financial statements from you as required by the judge's order, and by the contract, on a yearly basis, and I have even had to write to you to request you to make your payments on time as you have been delinquent in your payments to us, and haven't been paying the correct amounts to us, which is a continuing violation of your contract, which quite frankly irritates the hell out of me. I don't know why, with a computer system like you

> have we can't get a printout as to your financial statements concerning this cable television system every year so we can calculate exactly whether or not we are getting paid at the rate we are supposed to be paid. It's just irritating to counsel and its irritating to myself that you continue to violate the contract, you violate the court order, because you don't seem to care about this community. *Regardless of that, we are going to review this testimony and hope you submit a proposal within the next four months for renewal of your contract that we can review, and if necessary have a subsequent public hearing so these people have an opportunity to go over that proposal.*

A. 286-87 (emphasis added).

After the close of the hearing, events occurred about which there was a sharp dispute in the trial testimony. Di Francesco, the council president and a third Borough witness testified that a conversation took place during which Di Francesco informed Eastern that it must submit a proposal on or before April 30, 1986. The three Eastern representatives testified that no such conversation took place and that no deadline was communicated to Eastern. The trial court credited the testimony of the Borough witnesses that Di Francesco told the Eastern representatives they should submit a proposal by April 30, 1986.

Eastern contends the trial court's finding is clearly erroneous, while the Borough defends it. We need not resolve this factual dispute, however, because the finding in the Borough's favor is not legally relevant.

III.

The Cable Act superimposes on an existing matrix of state regulation new federal standards. Thus, the Act imposes federal obligations on franchising authorities, which are creatures of state law. In a

number of places the Act refers to action by such franchising authorities, without specifying the formalities required for such action. A notable instance is section 546(b)(3) which refers to the establishment of a date by which a renewal proposal shall be submitted. There are, of course, due process minimums for such actions. *See, e.g., Tucker v. United States Postal Service*, 676 F.2d 957 (3d Cir. 1982) (claims under the Federal Tort Claims Act, 28 U.S.C. §§ 2674, 2675 must be submitted to appropriate government agency in detailed, written form); *In re Herd*, 840 F.2d 757 (10th Cir. 1988) ("[w]ritten notice of the bar deadline date for filing claims . . . [under the Bankruptcy Code, 11 U.S.C. § 2002(a)(8) must] . . . be clear and unambiguous."). Short of such minimums, the courts might fill in the interstices in the federal statutory scheme by specifying such formalities. In the absence, however, of any conflict between state law and either due process or the underlying federal statutory policy, there is no reason to assume that Congress did not intend that state law govern the formalities required for action by a franchising authority. *See e.g., United States v. Kimball Foods, Inc.*, 440 U.S. 715 (1979) (look to state law for federal common law rule as long as it is not discriminatory or in conflict with federal statute). *See generally*, C. Wright, Law of Federal Courts 394-95 (4th Ed. 1984).

In this case the franchising authority is a Pennsylvania Borough. Pennsylvania law vests the management of a borough's affairs in its council. 53 Pa. Con. Stat. §§ 46001, 46005 (Purdon 1966). The manner in which the council acts depends on the nature and importance of the contemplated action. The statutory provision here relevant states that:

> [I]t shall be the duty of the borough council:
>
> * * *

> (3) To enact, revise, repeal and amend such bylaws, rules, regulations, ordinances and resolutions, not inconsistent with the laws of the Commonwealth, as it shall deem beneficial to the borough and to provide for the enforcement of the same. The legislative powers of boroughs including capital expenditures not payable out of current funds, shall be exercised by or be based on an ordinance. All other powers shall be exercised by vote of the majority of council present at a meeting, unless otherwise provided. Routine, ministerial or administrative purchases and powers may be made and exercised by officers and committees, if authority therefor was previously given, or if the action is subsequently ratified by council. Whenever any action is subsequently ratified by council. Whenever any action by the council shall result in a specific written contract or agreement, such contract or agreement shall be signed by the president of the borough council.

53 Pa. Con. Stat. § 46006(3) (Purdon 1987 Supp.) At a minimum, this statute required that the power to fix a deadline for the submission of a renewal proposal be exercised by a resolution and a majority vote of the council. There is no evidence in the record of any such action. The only evidence is that the Borough Solicitor orally fixed the April 30, 1986 deadline. Even if fixing a deadline were construed to be a routine ministerial power there is no evidence that the Borough had prior to December 10, 1985 conferred such authority on the Borough attorney There is no evidence that prior to April 30, 1986 the Borough Council ratified the Borough Solicitor's action.

We hold that the fixing pursuant to section 546(b)(3) of a deadline for submission of a franchise renewal application must be done with at least the

formalities required by the state law governing the actions of the state chartered franchising authority: in this instance those required by 53 Pa. Con. Stat. § 46006(3). Since the Borough presented no evidence that the April 30, 1986 deadline was so fixed, the failure of Eastern to meet it cannot be relied upon as a ground for affirming the judgment appealed from.

The complete absence of evidence of a properly established deadline technically suggests that there is no need to address Eastern's further objection that notice of the deadline was in any event inadequate. Since, however, this is the first occasion on which we must construe the Cable Act, but certainly will not be the last, we deem it appropriate to note the contention. The Cable Act establishes a significant federal law property expectation in the renewal of a franchise. Section 546(b)(3) enables a franchising authority to "establish" a deadline. To establish means, at least, to settle or fix firmly; to put beyond doubt or dispute. Since the establishment of such a deadline has a very significant effect upon the federal law property expectation in renewal of a franchise, the franchise holder's interest in it is considerable. Compliance with the deadline is the franchise holder's only opportunity to preserve its right to the formal administrative hearing on renewal specified in the Cable Act, its right to a written statement of reasons for nonrenewal and its opportunity for judicial review of a negative renewal decision. The burden on a franchising authority of giving a formal written notice of the establishment of such a deadline is minimal. In these circumstances, whether or not due process requires a more formal notice than a casual remark at the end of a hearing devoted to another purpose, a reasonable federal common law rule, implied from the overall scheme of the Cable Act clearly does. Thus, we are prepared to hold not only that a section 546(b)(3) deadline must be

established by the formalities required by state law, but that when it is so established it must be communicated to the franchise holder in writing. See 47 U.S.C. § 555 (action seeking judicial review must be brought within 120 days after receiving notice of [adverse] determination). Such a construction of the Cable Act is consistent with the overall purpose of Congress, amply reflected in its legislative history, of assuring a high degree of protection to cable operators. See H.R. Rep. No. 934, 98th Cong. 2d Sess. 25, *reprinted in* 1984 *U.S. Code Cong. & Ad. News*, 4655, 4662-63, 4709, 4710.

IV.

The district court, in dismissing Eastern's suit, held alternatively that it was time barred by 47 U.S.C. § 555. That section provides that "[a]ny cable operator adversely affected by any final determination made by a franchising authority under section 545 or 546 of this title may commence an action within 120 days after receiving notice of such determination." Eastern's action was filed on March 12, 1987, which was within 120 days of receipt of a November 13, 1986 letter advising that the Borough would not convene a section 546(b) administrative hearing.

The district court, however, held that the final determination not to renew occurred on June 30, 1986 when the Borough rejected Eastern's renewal application. We must determine, therefore, how the judicial review provisions of section 546(e) and the time limit in section 555 interrelate. The latter, on its face, appears to apply both to final nonrenewal decisions made after an administrative hearing and to procedural defaults such as refusals to convene such a hearing. Timeliness therefore turns upon the type of adverse action of which Eastern complains.

We have held in Part III above that the Borough did

not lawfully establish a deadline for the submission of a renewal application. That being the case, Eastern's submission of a renewal application on July 13, 1986 was timely. 47 U.S.C. § 546(h). Eastern's November 3, 1986 written request for a section 546(c) administrative hearing was also timely. The adverse action of which Eastern complains is the Borough's refusal to convene an administrative hearing. Eastern filed a complaint challenging notice of that adverse action within 120 days of receipt of notice of the Borough's refusal. Therefore, the action is not time barred.

Our attention has been called to the 4-month period referred to in section 546(c)(1). We read that provision as placing a limit on the time within which a franchising authority must complete administrative proceedings on a duly submitted renewal application. Any other reading would render section 546(h) a nullity, since it says that a cable operator may submit a renewal proposal "at any time."

V.

There is no record evidence establishing that the Borough lawfully established a section 546(b)(3) deadline. Eastern's action is not time barred. The judgment appealed from will therefore be reversed and the case remanded for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

EASTERN TELECOM CORPORATION,

Plaintiff,

vs.

BOROUGH OF EAST CONEMAUGH, CAMBRIA COUNTY, PENNSYLVANIA, FRANCIS FEIST, LARRY GOSSARD, ROBERT FISHER, JR., JOSEPH STECIK and MICHAEL VARGO, individual council members or their elected replacements,

Defendants.

Civil Action No. 87-557

FINDINGS OF FACT AND

CONCLUSIONS OF LAW

This is an action pursuant to the Cable Communications Policy Act of 1984, as amended, 47 U.S.C. § 521 et seq., (Cable Act) in which plaintiff, Eastern Telecom Corporation, (Eastern Telecom) seeks an order under 47 U.S.C. § 546(e)(1) and § 555, requiring

defendants, Borough of East Conemaugh, et al., (the Borough) to conduct an administrative proceeding under Section 626(c) of the Cable Act, 47 U.S.C. § 546(c), or in the alternative, to grant plaintiff leave to appeal the defendants' decision not to renew plaintiff's cable television franchise under Section 626 of the Cable Act, 47 U.S.C. § 546.

After a non-jury trial, and for the reasons set forth below, plaintiff's motion seeking an order directing the Borough to conduct an administrative proceeding under Section 626(c) of the Cable Act, 47 U.S.C. § 546(c), will be denied. Further, the court concludes that it lacks jurisdiction to review the final determination of the Borough

denying Eastern Telecom's renewal of its cable franchise, and thus, plaintiff's motion seeking leave to appeal defendants' decision denying renewal of plaintiff's cable television franchise under Section 626 of the Cable Act, 47 U.S.C. § 546, will be denied.

Findings of Fact

1. Plaintiff, Eastern Telecom Corporation, (Eastern Telecom) is a corporation organized under the laws of the Commonwealth of Pennsylvania and is in the business of owning and operating cable television systems. (See parties' Joint Stipulation of Facts, number 1).

2. Defendant, the Borough of East Conemaugh (the Borough) is a Pennsylvania borough incorporated

pursuant to 53 Pa.C.S. § 45201. Defendants Francis Feist, Larry Gossard, Robert Fisher, Jr., Joseph Stecik and Michael Vargo are individual Borough council members or their elected replacements. (See parties' joint stipulation of facts, number 2).

3. Eastern Telecom has provided cable television service to residents of the Borough, pursuant to a franchise issued by the Borough, continuously since 1951. (See parties' joint stipulation of facts, number 3).

4. The franchise by its terms expired on July 1, 1988. (See parties' joint stipulation of facts, number 4).

5. By letter dated November 12, 1985, James R. DiFrancesco, solicitor for the Borough, provided

notice to Eastern Telecom of a public meeting to be held on December 10, 1985, in accordance with the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 et seq. (the Act). (See parties' joint stipulation of of facts, number 5; plaintiff's Exhibits 1).

6. The Borough conducted a public hearing on December 10, 1985 in accordance with Section 626(a) of the Act, 47 U.S.C. § 546(a), for the purpose of receiving statements from Borough residents concerning Eastern Telecom's performance under the franchise and to identify the future, cable-related community needs and interests of the Borough. (See parties' joint stipulation of facts, number 6; plaintiff's Exhibit 2).

7. At the public hearing held on December 10, 1985, the Borough inquired as to whether Eastern Telecom was prepared to submit a proposal for renewal of its cable television franchise. (See parties' joint stipulation of facts, number 7).

8. Eastern Telecom did not submit a proposal for renewal of its cable television franchise at the public hearing of December 10, 1985.

9. James R. DiFrancesco, solicitor for the Borough, following the public hearing held on December 10, 1985, gave oral notice to Mr. Zavarella, Mr. Gingery and Mr. Senko, representatives of Eastern telecom, that a proposal for renewal of its franchise agreement was required to be

submitted to the Borough by April 30, 1986.

10. The Borough did not provide Eastern Telecom with written notice that the proposal for renewal of its franchise agreement was to be submitted to the Borough by April 30, 1986.

11. No such proposal was submitted to, or received by, the Borough by April 30, 1986. At a council meeting held May 13, 1986, before the Borough's receipt of a renewal proposal from Eastern Telecom, Borough council reviewed the history of Eastern Telecom's cable television system and the needs of the local community and voted not to renew the franchise.

Eastern Telecom thereafter submitted a proposed Franchise

Agreement to the Borough by a letter dated June 14, 1986, from its legal counsel, Paul D. Zavarella, Esq. The proposal contained no exhibits identifying the television channels involved. (See parties' joint stipulation of facts, number 8; plaintiff's Exhibits 3 and 4).

13. By a letter dated June 30, 1986, the Borough, through its solicitor, forwarded to Eastern Telecom, a copy of the Findings of Fact, Conclusion and Decision, adopted by the Borough council at its May 13, 1986 meeting, that the franchise would not be renewed at the expiration of its term on July 1, 1988. (See parties' joint stipulation of facts, number 9; plaintiff's Exhibits 5 and 6).

14. By a letter dated November 3, 1986, Eastern Telecom, through its counsel, requested that the Borough schedule and conduct an administrative hearing in accordance with Section 626(c) of the Act, 47 U.S.C. § 546(c). (See parties' joint stipulation of facts, number 10; plaintiff's Exhibit 7).

15. By a letter dated November 19, 1986, the Borough, through its solicitor, denied Eastern Telecom's request for an administrative hearing under Section 626(c) of the Act, 47 U.S.C. § 546(c). (See parties' joint stipulation of facts, number 11; plaintiff's Exhibit 8).

16. On March 12, 1987, Eastern Telecom filed the above-captioned

action. (See parties' joint stipulation of facts, number 12).

Conclusion of Law

17. The Cable Act, as amended, 47 U.S.C. § 521 et seq., establishes a framework and provides standards for regulating the cable television industry. The objective of the Cable Act is that cable franchise agreements be applied and modified in order to obtain a realistic and flexible regulatory framework that recognizes both the needs of local government and cable operators. The primary concerns of the Cable Act, however, are to make the local franchising process the primary means of cable television regulation and to insure that the cable systems provided are responsive to the

needs and interests of the local communities. Tribune - United Cable v. Montgomery County, 784 F.2d 1227, 1231 (4th Cir. 1986); Rollins Cablevue, Inc. v. Saienni Enterprises, 633 F.Supp. 1315 (D.Del. 1986).

18. Section 626 of the Cable Act, 47 U.S.C. § 546, provides procedures and standards by which an incumbent cable operator can seek renewal of a franchise term. Rollins Cablevue, Inc. v. Saienni Enterprises, supra. The purpose of Congress in establishing the procedures and standards for franchise renewals was to provide the cable operator protection against an unfair denial of renewal by the franchising authority. Rollins Cablevue, Inc., supra. at 1319,

citing, H.R.Dep. 934, 98th Cong., 2d Sess. 70, reprinted in 1984 U.S.Code Cong. & Admin. News 4655, at 4709. However, the actual franchise renewal procedures and standards set forth in the Cable Act were ". . .designed to give some stability and certainty to the renewal process, while continuing to provide the franchising authority with the ability to assure that renewal proposals are reasonable to meet community needs and interests, relative to the costs thereof". H.R. Rep. 934, 98th Cong., 2d Sess. 70, reprinted in, 1984 U.S.Code Cong. & Admin. News 4655 at 4662.

19. Subsection (a) of Section 626 of the Cable Act, 47 U.S.C. § 546(a), sets forth the first stage

of the renewal procedure. It provides:

> During the 6-month period which begins with the 36th month before the franchise expiration, the franchising authority may on its own initiative, and shall at the request of the cable operator, commence proceedings which afford the public in the franchise area appropriate notice and participation for the purpose of - (1) identifying the future cable-related community needs and interests; and (2) reviewing the performance of the cable operator under the franchise during the then current franchise term.

20. In the present case, the first stage of the renewal procedure was initiated by the franchising authority and was held by a public hearing on December 10, 1985, within the 30 to 36 month period before the franchise date expiration of July 1, 1988. The hearing afforded appropriate notice and participation for the purpose of reviewing the operator's

past performance and identifying future cable-related community needs and interests, in accordance with Section 626(a) of the Cable Act, 47 U.S.C. § 546(a).

21. Section 626(b)(1) of the Cable Act, 47 U.S.C. § 546(b)(1) provides that, upon completion of the first stage of the renewal procedure, a cable operator may, on its own initiative or at the request of a franchise authority, submit a proposal for renewal of its franchise. In addition, Section 626(b)(2) of the Cable Act, 47 U.S.C. § 546(b)(2), provides that the franchising authority, subject to particular limitations, may specify that certain information be included in such proposal. And

finally, with regard to the time for submission of a renewal proposal, the Act states:

> the franchising authority may establish a date by which such proposal shall be submitted.

47 U.S.C. 546(b)(3).

22. At the completion of the first stage proceedings, the Borough orally notified Eastern Telecom to submit to the Borough, by April 30, 1986, a proposal for renewal of its franchise agreement. Eastern Telecom did not submit a proposal by April 30, 1986. When no proposal was submitted, the Borough, at a council meeting held on May 13, 1986, reviewed the existing franchise and determined that Eastern Telecom's cable systems were not responsive to the needs and interests

of the local community, and therefore, voted not to renew Eastern Telecom's franchise. Eastern Telecom thereafter submitted a renewal proposal to the Borough on June 14, 1986. The Borough then communicated its decision of May 13, 1986 to Eastern Telecom, by a letter stating:

> Borough Council, after reviewing the history Eastern's cable T.V. system, documentation on record with the Borough, and reviewing the testimony of the subscribers to the Eastern system with the Borough, and particularly noting Eastern's failure to submit a new proposal franchise agreement in compliance with the "Cable Communication Policy Act of 1984", Borough Council denies forthwith Eastern any exclusive cable T.V. franchise within the Borough territorial limits; and, Borough Council further orders that Eastern shall not be entitled to renew its Franchise Agreement within the Borough and to continue service to the subscribers of this cable television system upon the expiration of their contract on June 1, 1988.

(Plaintiff's Exhibit 6).

23. It is Eastern Telecom's position that, although Section 626(b)(3) of the Cable Act, 47 U.S.C. § 546(b)(3), authorizes a franchising authority to establish a date by which a cable operator shall submit a renewal proposal, the Cable Act does not specifically provide that an operator's failure to meet such a deadline permits the franchising authority to deny a renewal of the franchise without engaging in the administrative proceedings set forth in Section 626(c) of the cable Act, 47 U.S.C. § 546(c).

24. The statute indicates that a cable operator seeking renewal of a franchise may submit a proposal for renewal either on its own initiative

or at the request of a franchising authority. In this instance, it was the Borough, as the franchising authority, that requested Eastern Telecom, the cable operator, to submit a proposal for renewal. Further, a plain reading of the language of the statute indicates that the franchising authority clearly has the power to establish a date when the proposal shall be submitted, and that timely submission of the proposal is mandatory. The use of the word "shall" in the portion of the statute denoting when the proposal is to be submitted indicates that a deadline established by the franchising authority be mandatory rather than directory. Black's Law Dictionary, Fifth Edition,

defines "shall" as follows:

> As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary signification, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation. It has a peremptory meaning, and it is generally imperative or mandatory.

25. An examination of the legislative history of the Cable Act supports an interpretation that the date established by a franchising authority for submission of a proposal, is a mandatory deadline. The House of Representatives Report in regard to the renewal procedures of Section 626, 47 U.S.C. § 546 states:

> At the completion of the first-stage proceedings, the franchising authority may require the cable operator to submit a proposal for renewal. Subject to section 624(b), which limits what a

> franchising authority may require in a new franchise, the franchising authority may specify that certain information be included in the proposal, including proposals for an upgrade of the system, and can set a date for submission of the proposal.

H.R. Rep. No. 934, 98th Cong., 2d Sess. 70, reprinted in 1984 U.S. Code Cong. & Admin. News 4655, 4710. (emphasis supplied).

26. The fact that the statute grants the franchising authority the right to establish a date for the submission of a proposal by the cable operator implies that there must be some cut-off point after which the franchising authority can expect to make a final determination. Otherwise, the franchising authority would be required to await receipt of a renewal proposal for an indefinite period of time before granting or denying a renewal and before franchising another

cable operator whose services are responsive to the needs of the community. Moreover, by providing renewal procedures in the Cable Act, it was Congress' intention to give stability and certainty to the renewal process. H.R. Rep. 934, 98th Cong., 2d Sess. 70, reprinted in, 1984 U.S. Code Cong. & Admin. News 4655 at 4662. Such Congressional intent would be frustrated were the franchising authority required to consider a renewal proposal submitted after the date established for its submission and after the authority had made a final determination denying renewal of the cable franchise.

27. Eastern Telecom's failure to submit a timely proposal for

renewal of its franchise precludes it from obtaining an administrative proceeding under Section 626(c) of the Cable Act, 47 U.S.C. § 546(c). That Section provides that an administrative proceeding commences only after the submittal of a proposal by the cable operator. That provision states:

> Upon submittal by a cable operator of a proposal to the franchising authority for the renewal of a franchise. . . . a preliminary assessment that the franchise should not be renewed and, . . . commence an administrative proceeding. . .

47 U.S.C. § 546(c)(1).

The legislative history regarding the administrative proceeding interprets the above provision as follows:

> Subsection 626(c) provides that <u>once the operator has submitted its proposal</u>, and within four months of the completion of the first-stage proceedings, the

> franchising authority must if the cable operator requests, or may at its own initiative commence an administrative proceeding.

H.R. Rep. No. 934, 98th Cong., 2d Sess. 70, reprinted in, 1984 U.S. Code Cong. & Admin. News 4655, 4710. (emphasis supplied). Eastern Telecom did not submit a renewal proposal by the date established by the Borough. The Borough thereafter voted not to renew Eastern Telecom's franchise. Eastern Telecom cannot now seek an administrative proceeding under the renewal provisions of the Cable Act. The court will accordingly decline to order the Borough to conduct an administrative proceeding under Section 626(c) of the Cable Act, 47 U.S.C. § 546(c).

28. As an alternative to its request for an administrative —

proceeding, Eastern Telecom seeks leave to appeal the Borough's decision not to renew Eastern Telecom's cable television franchise. Under the Cable Act, Section 636(sic), 47 U.S.C. § 555, "(a)ny cable operator adversely affected by any final determination made by a franchising authority under section 545 or 546 of this title may commence an action within 120 days after receiving notice of such determination, which may be brought in the district court of the United States for any judicial district in which the cable system is located. . ." This statutory period begins to run from the date on which the franchising authority denies or otherwise adversely affects the renewal of the cable

operator's franchise. See H.R. Rep. No. 934, 98th Cong. 2d Sess., reprinted in, 1984 U.S. Code Cong. & Admin. News 4655, 4731.

29. Here, the final determination of the Borough franchising authority occurred on June 30, 1986, the day on which Eastern Telecom received notice of the Borough's decision denying renewal of its franchise. This action was not filed until March 12, 1987, more than 120 days after Eastern Telecom received notice of Borough's decision denying renewal of the cable franchise. The present action was not timely under Section 636(sic), 47 U.S.C. § 555. Therefore, this court lacks jurisdiction to review

the final determination of the Borough franchising authority denying Eastern Telecom's renewal of its cable franchise.

An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

EASTERN TELECOM CORPORATION

Plaintiff,

vs.

BOROUGH OF EAST CONEMAUGH, CAMBRIA COUNTY, PENNSYLVANIA, FRANCIS FEIST, LARRY GOSSARD, ROBERT FISHER, JR., JOSEPH STECIK and MICHAEL VARGO, individual council members or their elected replacements,

Defendants.

Civil Action No. 87-557

ORDER

AND NOW, this 6th day of July, 1988, in accordance with the foregoing findings of fact and conclusions of law, in the above-captioned civil action, it is ORDERED that judgement be, and hereby is, entered against plaintiff, Eastern Telecom Corporation,

and in favor of defendants, Borough of East Conemaugh, Cambria County, Pennsylvania, Francis Feist, Larry Gossard, Robert Fisher, Jr., Joseph Stecik and Michael Vargo, individual council members or their elected replacements.

William L. Standish
United States District Judge

cc: John Previs, Esq.
Mark Shepard, Esq.
Buchanan Ingersoll
57th Floor, 600 Grant Street
Pittsburgh, PA 15219

Sandra W. Upor, Esq.
238 West Union Street
Somerset, PA 15501

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

EASTERN TELECOM CORPORATION,

Plaintiff,

vs.

BOROUGH OF EAST CONEMAUGH, CAMBRIA COUNTY, PENNSYLVANIA, FRANCIS FEIST, LARRY GOSSARD, ROBERT FISHER, JR., JOSEPH RISHELL, JOHN ZALUZSKI, JOHN STECIK and MICHAEL VARGO, individual council members or their elected replacements,

Defendants.

Civil Action 87-557

MEMORANDUM OPINION

ZIEGLER, District Judge

(1) Defendant borough and council members move to dismiss under Fed.R.Civ.P. 12(b)(1), for judgement on the pleadings under Fed.R.Civ.P. 12(c) and/or for summary judgement under Fed.R.Civ.P. 56. Defendants argue that plaintiff cable operator has not filed a timely complaint under

the Cable Communications Policy Act of 1984, 47 U.S.C. § 541 et al., following council's vote to terminate plaintiff's franchise.

(2) Jurisdiction is based on 28 U.S.C. § 1331 and 47 U.S.C. § 546(e).

(3) According to the complaint, plaintiff franchisee provided cable television service to East Conemaugh Borough residents since 1951. The current franchise agreement expires on July 1, 1988, and plaintiff desires to renew the franchise, The Borough conducted a public hearing in December 1985 for the purpose of receiving statements from cable customers concerning future cable needs and plaintiff's performance. At the May

1986 meeting, Borough Council voted not to renew the franchise. Apparently unaware of council's vote, plaintiff submitted a proposal to renew the franchise on June 14, 1986. The Borough then informed plaintiff of its vote by a letter dated June 30, 1986. According to an affidavit by the cable operator's general manager, plaintiff then submitted a formal request for an administrative proceeding to present evidence in support of its renewal proposal. Affidavit of Matthew Senko, at paragraph 14.

(4) Defendants argue that the Cable Communications Policy Act requires plaintiff to appeal to the district court within 120 days after

receiving notice of an adverse decision by the franchising authority. Defendants state that the franchisee was told at the public hearing to submit a renewal proposal within four months. No proposal was submitted until after the four-month period and after the termination decision, according to defendants. Further, defendants argue, the instant complaint was not filed until March 12, 1987, more than four months after council notified plaintiff of its vote.

(5) Under 47 U.S.C. § 555, "(a)ny cable operator adversely affected by any final determination made by a franchising authority under section 545 or 546 of this

title may commence an action within 120 days after receiving notice of such determination . . . ." This statutory period obtains only where a final determination not to renew has been made by the franchising authority after compliance with 47 U.S.C. § 546 procedures.

(6) Because both parties have submitted affidavits on the issue whether defendants complied with procedures set forth in the act, we shall consider the instant matter as motions for summary judgment. Fed.R.Civ.P. 12(b) and (c). Summary judgment may be granted only if, upon a review of the materials properly before the court, and viewing the evidence thus considered

in a light most favorable to the non-moving party, the court is convinced that no genuine issue of material fact remains for trial and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56; Baker v. Lukens Steel Co., 793 F.2d 509 (3d Cir. 1986). Under Rule 56(c), the judge is not to weigh the evidence and determine the truth, but is to determine whether an issue of material fact remains for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. ___, 106 S.Ct. 2505 (1986). Credibility determinations, weighing of evidence and the drawing of legitimate inferences are functions of the fact-finder. Id.

(7) We believe that several issues of material fact remain concerning whether defendants' vote of May 1986 can be treated as a "final determination made by a franchising authority" under the procedures set forth in 47 U.S.C. § 546. First, the parties disagree whether plaintiff was given a four-month deadline to submit a renewal proposal. See affidavit of Borough Council President Robert Fisher, Jr., at paragraph 8; affidavit of Senko, at Paragraph 9. The transcript of the December 1985 public hearing reveals no such deadline. Consequently, a dispute remains over whether the franchisee complied with a franchising

authority deadline. 47 U.S.C. § 546(b)(3).

(8) Secondly, an issue exists concerning whether defendants complied with the two-step procedure before voting not to renew plaintiff's franchise. According to Section 546, before denying a proposal to renew, the franchising authority must conduct a public hearing and issue preliminary assessment of nonrenewal. The operator then may request an administrative proceeding before the franchise authority or its designee to offer evidence in support of its proposal. The authority then issues a final determination. According to evidence presented in the instant case, a public hearing was held and the

franchising authority voted not to renew the franchise. Defendants have not stated that an administrative proceeding was held, despite plaintiff's request for such proceeding on November 3, 1986. Exhibit 7 to Fisher Affidavit.

A written order will follow.

Donald E. Ziegler
United States District Judge

DATED: July 8, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

EASTERN TELECOM CORPORATION

Plaintiff,

vs.

BOROUGH OF EAST CONEMAUGH,
CAMBRIA COUNTY, PENNSYLVANIA
FRANCIS FEIST, LARRY GOSSARD,
ROBERT FISHER, JR., JOSEPH RISHELL,
JOHN ZALUZSKI, JOHN STECIK and
MICHAEL VARGO, individual council
members or their replacements,

Defendants.

Civil Action 87-557

ORDER OF COURT

AND NOW, this 8th day of July, 1987, IT IS ORDERED that defendant's motion for summary judgement be and hereby is denied.

Donald E. Ziegler
United States District Judge

cc: James R. DiFrancesco, Esq.
Paul D. Zavarella, Esq.
Mark D. Shepard, Esq.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 88-3516

EASTERN TELECOM CORPORATION,
Appellant,

vs.

BOROUGH OF EAST CONEMAUGH, FRANCIS FEIST, LARRY GOSSARD, ROBERT FISHER,JR. JOSEPH RISHELL, JOHN ZALUSKI, JOHN STECIK and MICHAEL VARGO, individual council members or their elected replacements,

Appellees

(DC Civil No. 87-557)

On Appeal from United States District Court for the Western District of Pennsylvania - Pittsburgh

Gibbons, Chief Judge, Seitz and Greenberg, Circuit Judges

JUDGEMENT

This cause came unto be heard on the record from the United States District Court for the Western District of Pennsylvania, Pittsburgh, and was

argued by counsel on January 24, 1989.

On consideration whereof, it is now here ordered and adjudged by this Court that the Judgement of the said District Court entered July 6, 1988 be, and the same is hereby reversed and the cause remanded to the said District Court by further proceedings consistent with the Opinion of this Court. Costs taxed against the Appellees.

Attest:

Sally Mrvos-Clerk

3-30-89

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3516

Eastern Telecom Corporation, Appellant

vs.

Borough of East Conemaugh, etc.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgement in lieu of formal mandate in the above cause be, and it is hereby stayed until May 20, 1989.

/s/ Chief Judge Gibbons
Circuit Judge

Dated: Apr 27, 1989

CABLE COMMUNICATIONS POLICY ACT OF 1984. Pub. L. 98-549, 98 Stat. 2780, 47 U.S.C. §521 et seq.

RENEWAL

"SEC. 626.(a) During the 6-month 47 USC 546 period which begins with the 36th month before the franchise expiration, the franchising authority may on its own initiative, and shall at the request of the cable operator, commence proceedings which afford the public in the franchise area appropriate notice and participation for the purpose of-

"(1) identifying the future cable-related community needs and interests; and

"(2) reviewing the performance of the cable operator under the franchise during the then current franchise term.

"(b)(1) Upon completion of a

proceeding under subsection (a), a cable operator seeking renewal of a franchise may, on its own initiative or at the request of a franchising authority, submit a proposal for renewal.

"(2) Subject to section 624, any such proposal shall contain such material as the franchising authority may require, including proposals for an upgrade of the cable system.

"(3) The franchising authority may establish a date by which such proposal shall be submitted.

"(c)(1) Upon submittal by a cable operator of a proposal to the franchising authority for the renewal of a franchise, the franchising authority shall provide prompt public notice of such proposal and, during the 4-month period which begins on the completion of any proceedings under

subsection (a), renew the franchise or, issue a preliminary assessment that the franchise should not be renewed and, at the request of the operator or on its own initiative, commence an administrative proceeding, after providing prompt public notice of such proceeding, in accordance with paragraph (2) to consider whether-

"(A) the cable operator has substantially complied with the material terms of the existing franchise and with applicable law;

"(B) the quality of the operator's service, including signal quality, response to consumer complaints, and billing practices, but without regard to the mix, quality, or level of cable services or other services provided over the system, has been

reasonable in light of community needs;

"(C) the operator has the financial, legal, and technical ability to provide the services, facilities, and equipment as set forth in the operator's proposal; and

"(D) the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests.

"(2) In any proceeding under paragraph (1), the cable operator shall be afforded adequate notice and the cable operator and the franchise authority, or its designee, shall be afforded fair opportunity for full participation, including the right to introduce evidence (including evidence related to issues

raised in the proceeding under subsection (a)),to require the production of evidense, and to question witnesses. A transcript shall be made of any such proceeding.

"(3) At the completion of a proceeding under this subsection, the franchising authority shall issue a written decision granting or denying the proposal for renewal based upon the record of such proceeding, and transmit a copy of such decision to the cable operator. Such decision shall state the reasons therefor.

"(d) Any denial of a proposal for renewal shall be based on one or more adverse findings made with respect to the factors described in subparagraphs (A)through (D) of subsection (c)(1), pursuant to the record of the proceeding

under subsection (c). A franchising authority may not base a denial of renewal on a failure to substantially comply with the material terms of the franchise under subsection (c)(1)(A) or on events considered under subsection (c)(1)(B) in any case in which a violation of the franchise or the events considered under subsection (c)(1)(B) occur after the effective date of this title unless the franchising authority has provided the operator with notice and the opportunity to cure, or in any case in which it is documented that the franchising authority has waived its right to object, or has effectively acquiesced.

"(e)(1) Any cable operator whose proposal for renewal has been denied by a final decision of a franchising authority made pursuant to this section,

or has been adversely affected by a failure of the franchising authority to act in accordance with the procedural requirements of this section, may appeal such final decision or failure pursuant to the provisions of section 635.

"(2) The court shall grant appropriate relief if the court finds that-

"(A) any action of the franchising authority is not in compliance with the procedural requirements of this section; or

"(B) in the event of a final decision of the franchising authority denying the renewal proposal, the operator ~~h~~as demonstrated that the adverse finding of the franchising authority with respect to each of the factors described in subparagraphs (A) through (D) of subsection (c)(1)

on which the denial is based is not supported by a preponderance of th evidence, based on the record of the proceeding conducted under subsection (c).

"(f) Any decision of a franchising authority on a proposal for renewal shall not be considered final unless all administrative review by the State has occurred or the opportunity therefor has lapsed.

"(g) For purposes of this section, the term 'franchise expiration' means the date of the expiration of the term of the franchise, as provided under the franchise, as it was in effect on the date of the enactment of this title.

"(h) Notwithstanding the provisions of subsections (a) through (g) of this section, a cable operator may submit a proposal for the renewal of a franchise

pursuant to this subsection at any time, and a franchising authority may, after affording the public adequate notice and opportunity for comment, grant or deny such proposal at any time (including after proceedings pursuant to this section have commenced). The provisions of subsections (a) through (g) of this section shall not apply to a decision to grant or deny a proposal under this subsection. The denial of a renewal pursuant to this subsection shall not affect action on a renewal proposal that is submitted in accordance with subsections (a) through (g).

JUDICIAL PROCEEDINGS

"SEC. 635. (a) Any cable operator adversely affected by any final determination made by a franchising authority under section 625 or 626 may commence an action within 120 days after receiving notice of such determination, which may be brought in- Courts, U.S. 47USC555

"(1) the district court of the United States for any judicial district in which the cable system is located; or

"(2) in any State court of general jurisdiction having jurisdiction over the parties.

"(b) The court may award any appropriate relief consistent with the provisions of the relevant section described in subsection (a).

COMMONWEALTH OF PENNSYLVANIA
BOROUGH CODE 53 P.S. 46006(3)

DUTIES OF COUNCIL

SEC. 46006(3) It shall be the duty of the borough council:

(3) to enact, revise, repeal and amend such bylaws, rules, regulations, ordinances and resolutions, not inconsistent with the laws of the Commonwealth, as it shall deem beneficial to the borough and to provide for the enforcement of the same. The legislative powers of boroughs including capital expenditures not payable out of current funds, shall be exercised by or be based on an ordinance. All other powers shall be exercised by vote of the majority of council present at a meeting, unless otherwise provided. Routine, ministerial or administrative

purchases and powers may be made and exercised by officers or committees, if authority therefor was previously given, or if the action is subsequently ratified by council. Whenever any action by the council shall result in a specific written contract or agreement, such contract or agreement shall be signed by the president of the borough council.

COMMONWEALTH OF PENNSYLVANIA
BOROUGH CODE 53 P.S. 46116

SOLICITOR TO HAVE CONTROL OF

LEGAL MATTERS

SEC. 46116 The legal matters of the borough shall be under the control of the borough solicitor, and no department or officer of the borough, except as herein otherwise provided, shall employ an additional counsel without the assent or ratification of the council. In the absence of the solicitor, the law firm of which he is a member or associate may perform any of the duties or functions of the solicitor.